Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

JOHN CASILLAN,

Plaintiff,

v.

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, Local 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETE PEREA, BERNIE SNYDER, GEORGE STANKO, GREG FISHER,

Defendants-Appellees-Respondents.

DAVID L. SMITH,

Attorney-Appellant-Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DAVID L. SMITH

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PRO SE ATTORNEY-APPELLANT-PETITIONER

50PP

QUESTIONS PRESENTED FOR REVIEW

Whether by dismissing Mr. Smith's appeal in the present case for failure to follow the filing restrictions set forth in its (June 29, 1998) opinion in Howard, infra, while refusing to grant a hearing or to address the issues raised and argued by him in his appellate brief, the Tenth Circuit deprived Mr. Smith of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision under 28 U.S.C. § 1291.

Whether the Tenth Circuit also violated Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654.

Whether unless this Court grants Mr. Smith's petition for a writ of certiorari, the Tenth Circuit's threat to prosecute him for criminal contempt will chill (or freeze) the exercise of these constitutional and statutory rights in other cases being pursued by him.

Whether the United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

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CITATIONS OF OPINIONS AND ORDERS

Casillan v. Regional Transportation District, et al., Case No. 98-1397 (10th Cir. December 3, 1998).

JURISDICTION

The order sought to be reviewed was entered by the United States Court of Appeals for the Tenth Circuit on December 3, 1998.

The statutory provision believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the Tenth Circuit's order of December 3, 1998 is 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Amendment I of the Constitution of the United States provides in relevant part as follows:

> Congress shall make no law . . . abridging . . . the right of the people to petition the Government for a redress of grievances.

Amendment V of the Constitution of the United States provides in relevant part as follows:

> . . . [N]or shall any person be . . . deprived of life, liberty or property, without due process of law . . . .

Amendment VI of the Constitution of the United States provides in relevant part as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

28 U.S.C. § 1291 provides as follows:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this Title [28 U.S.C. §§ 1292(c), (d), 1295].

28 U.S.C. § 1654 provides as follows:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

28 U.S.C. § 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Pro se attorney-appellant-petitioner David L. Smith ("Mr. Smith") hereby files his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

On June 29, 1998, the United States Court of Appeals for the Tenth Circuit issued its opinion denying Mr. Smith's appeals in two federal civil rights cases without addressing the issues raised and argued by him in his appellate briefs. See Howard v. Mail-Well Envelope Company, 150 F.3d 1227 (10th Cir.), cert. denied, ____ U.S. ____, 119 S.Ct. 546, 142 L.Ed.2d 454 (1998). The Tenth Circuit then enjoined Mr. Smith from proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in the Tenth Circuit, unless he first obtains permission to proceed pro se. See id. The Tenth Circuit gave Mr. Smith ten days from the date of its opinion to file written objections, limited to fifteen pages, to these proposed filing restrictions. See id.

On December 3, 1998, the Tenth Circuit issued its order dismissing Mr. Smith's appeal in the present case for failure to follow the filing restrictions set forth in its (June 29, 1998) opinion in Howard, while refusing to grant a

hearing or to address the issues raised and argued by him in his appellate brief.

II. ARGUMENT

Under the foregoing circumstances, the Tenth Circuit deprived Mr. Smith of his First Amendment right to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision under 28 U.S.C. § 1291. See Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("the obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996) ("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984) ("every party is entitled to a full, considered, and impartial review of the decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d

145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997). See also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the

courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972 and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998). The Tenth Circuit also violated Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654. See McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Devine v. Indian River County School Board, 121 F.3d 576 (11th Cir. 1997). Unless this Court grants Mr. Smith's petition for a writ of certiorari, the Tenth Circuit's threat to prosecute him for criminal contempt will chill (or freeze) the exercise of these constitutional and statutory rights in other cases being pursued by him.[1]

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[1]Mr. Smith is pro se attorney-plaintiff in three lawsuits pending in the United States District Court for the District of Colorado seeking damages and

III. CONCLUSION

The United States Court of Appeals for the Tenth Circuit has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has so far

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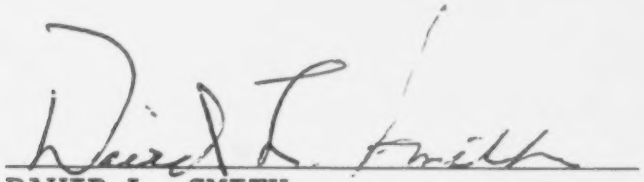
other legal and equitable relief against the Regional Transportation District ("RTD"), as well as attorneys and officials associated with the RTD who engaged in a conspiracy to procure, initiate, and continue criminal or quasi-criminal proceedings against him without probable cause and primarily for a purpose other than that of securing the proper adjudication of the charges, claims and allegations on which the proceedings were based, all in violation of 42 U.S.C. §§ 1983, 1985, 1986, the First, Seventh, and Fourteenth Amendments to the Constitution of the United States, and Colorado common law. In addition, Mr. Smith is pro se attorney-plaintiff in a fourth lawsuit pending in the United States District Court for the District of Colorado seeking damages and other legal and equitable relief against his former attorneys for legal malpractice based on negligent or intentional breach of their fiduciary duties of effective assistance of counsel, undivided loyalty, and candor, honesty, and fair dealing.

departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; and has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Mr. Smith therefore requests this Court to grant his Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, and such other and further relief as may be just under the circumstances, including an order under 28 U.S.C. § 2106 reversing and vacating the Tenth Circuit's (December 3, 1998) order.

Respectfully submitted,



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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN CASILLAN,

Plaintiff-Appellee,

v.

REGIONAL TRANSPORTATION DISTRICT, et al.,

Defendants-Appellees, No. 98-1397

and

DAVID L. SMITH,

Movant-Appellant.

ORDER
Filed December 3, 1998

Before Seymour, Chief Judge.

This matter is before the court following receipt of appellant David L. Smith's response to our October 26, 1998 show cause order. In that order, we directed Mr. Smith to show cause why this appeal should not be dismissed for

failure to comply with the filing restrictions set forth in this court's opinion in Howard v. Mail-Well Envelope Company, 150 F.3d 1227 (10th Cir. 1998). On November 2, Mr. Smith filed his response to the court's order. After carefully reviewing that pleading, as well as the other materials on file, the court concludes Mr. Smith has not shown cause why this matter should not be dismissed. Mr. Smith has not followed the restrictions and has not provided cause for continuing this appeal. Consequently, the matter is dismissed. A certified copy of this order shall stand as and for the mandate of the court.

Entered for the Court
PATRICK FISHER, Clerk of Court

by:
Elisabeth A. Shumaker
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN CASILLAN,

Plaintiff,

v. No. 98-1397

REGIONAL TRANSPORTATION DISTRICT, et al.,

Defendants-Appellees.

DAVID L. SMITH,

Attorney-Appellant.

VERIFIED RESPONSE TO ORDER TO SHOW CAUSE WHY THIS APPEAL SHOULD NOT BE DISMISSED

COMES NOW attorney-appellant David L. Smith ("Mr. Smith") and files his Verified Response to Order to Show Cause Why This Appeal Should Not be Dismissed:

1. On June 29, 1998, the United States Court of Appeals for the Tenth

Circuit issued its opinion (a copy of which is attached hereto as Exhibit 1) denying Mr. Smith's appeals in two federal civil rights cases without addressing the issues raised and argued by him in his appellate briefs. The Tenth Circuit then enjoined Mr. Smith from proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in the Tenth Circuit, unless he first obtains permission to proceed pro se. The Tenth Circuit gave Mr. Smith ten days from the date of its opinion to file written objections, limited to fifteen pages, to these proposed filing restrictions.

2. On July 14, 1998, the Tenth Circuit issued its order (a copy of which is attached hereto as Exhibit 2) summarily denying Mr. Smith's Petition for Rehearing, Suggestion for Rehearing En Banc, and Objections to Prospective Filing Restrictions and Injunction.

3. In its (June 29, 1998) opinion, the Tenth Circuit found and concluded that by filing and pursuing his appeals, Mr. Smith was attempting to re-litigate issues already determined by the Tenth Circuit or foreclosed by previous determinations of the Tenth Circuit, in violation of orders issued by the Tenth Circuit in previous cases. However, the issues raised and argued by Mr. Smith in these previous cases were different from those raised and argued by him in the cases under review. The parties were

also different. In at least four of these previous cases, the standard or burden of proof was different.[2] In all of these previous cases, the Tenth Circuit refused to address the issues raised and argued by Mr. Smith--a blatant and egregious violation of his First Amendment right to access to the courts to petition the government for a redress of grievances and his Fifth Amendment right to due process of law, including his right to appeal a final decision by a district court and to receive meaningful review of that decision under 28 U.S.C. § 1291. See Coppedge v. United States, 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962); Salve Regina College v. Russell, 499 U.S. 231, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ("the obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's

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[2]See In re David L. Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994); In re David L. Smith, 76 F.3d 335 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 186, 136 L.Ed.2d 125 (1996); In the Matter of David L. Smith, Nos. 95-1091 and 95-1119 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 359, 136 L.Ed.2d 251 (1996); Smith v. United States Court of Appeals for the Tenth Circuit, et al., No. 98-1030 (10th Cir.), cert. pending in Supreme Court No. 98-265.

determinations"); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); United States v. Jose, 519 U.S. 54, 117 S.Ct. 463, 136 L.Ed.2d 364 (1996) ("finality, not ripeness, is the doctrine governing appeals from District Court to Circuit Court"); Brewen v. United States, 375 F.2d 285 (5th Cir. 1967); Matter of McLinn, 739 F.2d 1395 (9th Cir. 1984) ("every party is entitled to a full, considered, and impartial review of the decision of the trial court"); Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3rd Cir. 1988); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Steiner Corp. v. Johnson & Higgins of California, 135 F.3d 684 (10th Cir. 1997). Nor did the Tenth Circuit give any independent reasons for its decisions. See id. The Tenth Circuit merely affirmed the orders issued by the United States District Court for the District of Colorado, which also refused to address the issues raised and argued by Mr. Smith--another blatant and egregious violation of his First and Fifth Amendment rights. See id.; see also NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("and under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92

S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976) ("a public official's threats to a citizen to withhold monies due and owing, should legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243, 1244 (10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084, 1087 (10th Cir. 1972); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998). Therefore, by filing and pursuing his appeals, Mr. Smith was not attempting to re-litigate issues already determined by the Tenth Circuit or foreclosed by

previous determinations of the Tenth Circuit, in violation of orders issued by the Tenth Circuit in previous cases.[3] Instead, Mr. Smith was attempting to litigate meritorious issues that the Tenth Circuit and the District Court have steadfastly refused to decide on their merits.[4] By refusing to address these

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[3]In other words, Mr. Smith was not attempting to litigate issues barred by the doctrines of res judicata and collateral estoppel, which have no application where the appellant did not have a full and fair opportunity to litigate his federal claims. See Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980).

[4]Since the issues Mr. Smith was attempting to litigate were well grounded in fact and were warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, or to establish new law, the Tenth Circuit's charge that these issues were "frivolous" was false. See McKnight v. General Motors Corporation, 511 U.S. 659, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent).

issues in its (June 29, 1998) opinion, the Tenth Circuit again deprived Mr. Smith of his First and Fifth Amendment rights.

4. By enjoining Mr. Smith from proceeding as an appellant, or as a petitioner in an original proceeding, without the representation of a licensed attorney admitted to practice in the Tenth Circuit, unless he first obtains permission to proceed pro se, the Tenth Circuit not only further violated his First and Fifth Amendment rights. See id. The Tenth Circuit also violated Mr. Smith's Sixth Amendment right to self-representation, including his right to proceed pro se under 28 U.S.C. § 1654. See McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984); Devine v. Indian River County School Board, 121 F.3d 576 (11th Cir. 1997). It should also be recognized that the record was devoid of any evidence upon which the Tenth Circuit could base imposing its injunction against Mr. Smith.

5. The Tenth Circuit gave Mr. Smith ten days from the date of its opinion to file written objections, limited to fifteen pages, to its proposed filing restrictions. However, by charging Mr. Smith with violating the Tenth Circuit's previous orders, the Tenth Circuit was charging him with what amounted to criminal contempt; and he was therefore

entitled to a full criminal process, including his Sixth Amendment right to a trial by jury on these charges.[5] See Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S.Ct. 492, 55 L.Ed.2d 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); International Union v. Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). At the very least, Mr. Smith was entitled to an evidentiary hearing at which he would have the opportunity to present expert testimony and other relevant evidence on his affirmative defenses and mitigating

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[5]As a matter of the equal protection of the laws, Mr. Smith should not have fewer constitutional rights merely because the Tenth Circuit brought charges against him sua sponte rather than in an order to show cause why he should not be held in contempt for allegedly violating the Tenth Circuit's previous orders. See Schware v. Board of Bar Examiners, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796 (1957); Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); Harper v. Virginia State Board of Elections, 383 U.S. 663, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971); Bodie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971).

circumstances to the charges being brought against him. See Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998). Under these circumstances, the Tenth Circuit committed reversible error by denying Mr. Smith's request for an evidentiary hearing.

6. Since the Tenth Circuit has demonstrated that it is incapable of rendering a fair and impartial decision with respect to any matter involving Mr. Smith, the Tenth Circuit also committed reversible error by denying his request for the cases under review to be transferred to the United States Court of Appeals for the Federal Circuit for decision.[6] See 28 U.S.C. § 455(a); Liteky v. United States, 510 U.S. 540,

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[6]Mr. Smith is a member in good standing of the bar of the Federal Circuit, and he believes that the judges of the Federal Circuit could have and would have rendered a fair and impartial decision in the cases under review.

114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decision-maker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decision-maker bias is grounds for reversal); Offut v. United States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed.2d 11 (1954) (nor may a judge or other ostensibly impartial decision-maker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). Further, the Tenth Circuit committed reversible error by denying Mr. Smith's request for an order dismissing with prejudice the frivolous and groundless charges it brought against him for the improper purpose of depriving him of his First and Fifth Amendment rights to litigate meritorious issues the Tenth Circuit and the District Court have steadfastly refused to decide on their merits. Finally, the Tenth Circuit committed reversible error by issuing a false and defamatory opinion that is unsupported by the law or the facts.

7. Under the foregoing circumstances, the Tenth Circuit's (June 29, 1998) opinion was void ab initio, and it is no longer equitable that this opinion should have prospective application.

WHEREFORE, Mr. Smith submits that this appeal should not be dismissed, and requests such other and further relief as may be just under the circumstances, including an order granting his Motion (filed on October 14, 1998) to Vacate Opinion Imposing an Injunction and Filing Restrictions Against David L. Smith, or transferring this matter to the United States Court of Appeals for the Federal Circuit for hearing and decision.

Dated this 2nd day of November, 1998.

Respectfully submitted,

David L. Smith
Pro Se Attorney-Appellant
1630 Welton Street, Suite 300
Denver, Colorado 80202
(303) 534-0153

VERIFICATION

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, David L. Smith, hereby verify that the information set forth in the foregoing Verified Response to Order to Show Cause Why This Appeal Should Not be Dismissed is true and correct to the best of my knowledge, information and belief.

_____
David L. Smith

Subscribed and sworn to before me by David L. Smith on this 2nd day of November, 1998.

Witness my hand and official seal.

_____
Notary Public

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 1998, true and correct copies of the foregoing Verified Response to Order to Show Cause Why This Appeal Should Not be Dismissed were placed in the United States mail, postage prepaid, addressed as follows:

John Casillan
7916 Sherman Street
Denver, Colorado 80221

Rolf G. Asphaug, Esq.
Sally Zack Wheeler, Esq.
Regional Transportation District
1600 Blake Street
Denver, Colorado 80202

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United States Courthouse
1929 Stout Street
Denver, Colorado 80294

Lynne L. Hicks, Esq.
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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOHN CASILLAN,

Plaintiff,

v.

No. 98-1397
(D.C. No. 90-S-1722)
(Dist. of Colo.)

REGIONAL TRANSPORTATION DISTRICT, AMALGAMATED TRANSIT UNION, Local 1001, MICHAEL GARCIA, RICHARD BAUMAN, ROBERT GARSIDE, ED RHATICAN, PETE PEREA, BERNIE SNYDER, GEORGE STANKO, GREG FISHER,

Defendants-Appellees.

DAVID L. SMITH,

Attorney-Appellant.

OPENING BRIEF FOR PRO SE ATTORNEY-APPELLANT DAVID L. SMITH

Pro se attorney-appellant David L. Smith hereby files his opening brief:

I. STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Subject matter jurisdiction of the United States District Court for the District of Colorado is based on 28 U.S.C. §§ 1331 and 1343; 42 U.S.C. §§ 1981 and 1983; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq.; § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185; and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

Appellate jurisdiction of the United States Court of Appeals for the Tenth Circuit is based on 28 U.S.C. § 1291.

II. ISSUES PRESENTED FOR APPEAL

Whether by issuing his order of September 18, 1998 denying plaintiff's and his attorney's Motions without affording them the opportunity to file a brief or otherwise be heard before entry of a final judgment, and without addressing the issues raised and argued by them, Judge Sparr deprived them of their First Amendment right to access to the courts to petition the government for a redress of grievances and their Fifth Amendment right to due process of law.

Whether the holding in Elam Construction, Inc. v. Regional Transportation District, 129 F.3d 1343, 1346 (10th Cir. 1997) that the RTD is a suable "person" within the meaning of 42 U.S.C. § 1983 is contrary to Judge Sparr's previous orders dismissing plaintiff's federal civil rights case, imposing attorney fee sanctions of more than $15,000.00 against the plaintiff and his attorney for filing an alleged "frivolous" appeal, indefinitely suspending plaintiff's attorney from the practice of law in the United States District Court for the District of Colorado, and disqualifying plaintiff's attorney from further representation of his client.

Whether it therefore follows that these previous orders were void ab initio, and that it is no longer equitable that these orders should have prospective application.

Whether the same is also true for Judge Sparr's order of September 18, 1998, which merely reaffirms his previous orders.

III. STATEMENT OF THE CASE

On May 15, 1995, the plaintiff and his attorney filed their Motion to Disqualify United States District Judge Daniel B. Sparr; Response to Motions for Attorney Fees and/or Sanctions; Motion for Attorney Fees and/or Sanctions Against Defendants' Attorneys Pursuant to

Fed. R. Civ. P. 11 and 28 U.S.C. § 1927; and Motion to Vacate Judge Sparr's orders Dated December 10, 1991, January 3, 1992, and April 15, 1993 ("Motions"). (Record, Volume I., Document 201, all pages.) A copy of plaintiff's and his attorney's Motions is attached hereto as Exhibit 1 and is incorporated herein by reference for all purposes.

On September 18, 1998, Judge Sparr issued his order denying plaintiff's and his attorney's Motions without affording them the opportunity to file a brief or otherwise be heard before entry of a final judgment, and without addressing the issues raised and argued by them. (Record, Volume I., Document 212, all pages.) A copy of Judge Sparr's order of September 18, 1998 is attached hereto as Exhibit 2 and is incorporated herein by reference for all purposes.

IV. ARGUMENT

In their Motions, the plaintiff and his attorney argued as follows:

> By participating (as a member of the District Court disciplinary panel) in the decision to issue the (February 10, 1995) disciplinary order imposing "identical" discipline against Mr. Smith as that imposed against him by the Tenth Circuit disciplinary panel in its (November 29, 1993) disciplinary order, and suspending Mr. Smith from the practice of law in the District

Court pursuant to D.C.COLO.LR 83.6.P., Judge Sparr gave effect to a local rule which is unconstitutional on its face, and as applied to Mr. Smith in the District Court disciplinary action, and to Mr. Smith and his clients in pending and potential civil rights litigation, including the Casillan case. Judge Sparr gave effect to this local rule even though the procedure followed by the Tenth Circuit disciplinary panel was so lacking in notice or opportunity to be heard that it denied due process; even though the kind of misconduct (if any) established against Mr. Smith has been held to warrant substantially less severe discipline; even though imposition by the District Court disciplinary panel of the same discipline as that imposed against Mr. Smith by the Tenth Circuit disciplinary panel has resulted in grave injustice; and even though Mr. Smith's attorney has refused to represent him competently in connection with the Tenth Circuit and District Court disciplinary actions.

By lifting the stay in Mr. Casillan's civil rights case and removing Mr. Smith as Mr. Casillan's attorney, Judge Sparr has acted beyond the scope of the District Court disciplinary panel's (February 10, 1995) disciplinary order, which does not permit removal of Mr. Smith

as attorney for his clients in pending federal civil rights litigation. Such permission would constitute an ex post facto or retroactive application of D.C.COLO.LR 83.6.P., and would interfere with Mr. Smith's right to represent his clients in accordance with the terms of their contingent fee agreements. See United States v. Dickstein, 971 F.2d 446, 451 (10th Cir. 1992). Such permission would also interfere with Mr. Smith's clients' First Amendment rights to pursue federal civil rights litigation. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); United Transportation Union v. State Bar of Michigan, 401 U.S. 576, 91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984). This is especially true for Mr. Casillan, who is financially unable to hire substitute counsel, and is

incompetent to proceed pro se against experienced defense counsel.

Even if the District Court disciplinary panel's (February 10, 1995) disciplinary order permits Judge Sparr to remove Mr. Smith as attorney for his clients in pending federal civil rights litigation, this could not be done without affording procedural due process of law. See Braley v. Campbell, supra; White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990). Mr. Casillan and Mr. Smith were denied procedural due process of law by Judge Sparr's refusal to allow Mr. Smith to argue on their behalf at the (April 7, 1995) Status Conference, which was held without prior notice of the contemplated removal and stay, and without an opportunity to file a brief.

Judge Sparr is proceeding in excess of the jurisdiction delegated to him by the Tenth Circuit hearing panel in its (January 15, 1993) order remanding Mr. Casillan's case to Judge Sparr "for a determination of reasonable attorney fees for each defendant for defending this appeal." Judge Sparr is also proceeding in excess of the jurisdiction delegated to him by Local rule 105A, which requires motions for attorney fees to be filed within ten days after entry of judgment. Defendants' attorneys

failed to file their motions for attorney fees for defending Mr. Casillan's case in the District Court until more than a year after entry of judgment. Furthermore, under Local Rule 105A, "[n]o attorney fees supplementary to a judgment will be awarded for any services rendered after the date of issuance of these rules unless the requesting party submits clear, meticulous, contemporaneous time and expense records reflecting all hours for which compensation is requested and the allotment of those hours to the specific tasks performed." See also White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990), citing Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983). Defendants' attorneys failed to submit time and expense records meeting the stringent requirements of Local Rule 105A, White and Ramos.

In addition, Defendants' attorneys filed their motions for attorney fees and/or sanctions, even though Mr. Casillan's second amended complaint presented colorable claims based on the facts and law at issue. White, supra. These motions for attorney fees and/or sanctions were filed for the improper purpose of chilling Mr. Casillan's First Amendment right to access to the federal courts, and of attempting to drive Mr. Smith out of federal civil rights practice. White, supra. The

amounts of attorney fees and/or sanctions requested are greatly in excess of any amounts that would be necessary to deter any undesirable behavior. White, supra. Judge Sparr therefore erred by denying Mr. Casillan's and Mr. Smith's motion for sanctions against Defendants' attorneys for filing frivolous motions for attorney fees and/or sanctions.

The foregoing matters are controlling issues of law upon which there is substantial room for dispute. Judge Sparr therefore abused his discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice by denying Mr. Smith's request for certification of his (April 7, 1995) bench ruling or order for purposes of an immediate appeal to the Tenth Circuit under 28 U.S.C. § 1292(b).

Under all the circumstances, Judge Sparr's impartiality might reasonably be questioned, and he was therefore obligated to disqualify himself pursuant to 28 U.S.C. § 455(a). By refusing to do so, Judge Sparr again grossly abused his discretion or otherwise acted improperly or in a manner detrimental to the fair and impartial administration of justice. Furthermore, where an attorney is disbarred by a biased judge during

> the course of litigation, he is entitled to an a immediate appeal or writ of mandamus or prohibition. Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975).

(Record, Volume I., Document 201, pages 28-32.) By issuing his order of September 18, 1998 denying plaintiff's and his attorney's Motions without affording them the opportunity to file a brief or otherwise be heard before entry of a final judgment, and without addressing the issues raised and argued by them, Judge Sparr deprived them of their First Amendment right to access to the courts to petition the government for a redress of grievances and their Fifth Amendment right to due process of law. See NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) ("[a]nd under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances"); Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 84 S.Ct. 1113, 12 L.Ed.2d 89 (1964); United Mine Workers v. Illinois, 389 U.S. 217, 88 S.Ct. 353, 19 L.Ed.2d 426 (1967); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970); Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); United Transportation Union v. State Bar of Michigan, 401 U.S. 576,

91 S.Ct. 1076, 28 L.Ed.2d 339 (1971); California Motor Transport Co. v. Trucking Unltd., 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); Board of Regents v. Roth, 408 U.S. 564, 96 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974); Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974); Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983); Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 104 S.Ct. 2803, 81 L.Ed.2d 732 (1984); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Talamini v. Allstate Insurance Co., 470 U.S. 1067 (1985); Crumpacker v. Indiana Supreme Court Disciplinary Commission, 470 U.S. 1074 (1985); Honda Motor Co., Ltd. v. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994); Burkett v. Chandler, 505 F.2d 217 (10th Cir.), cert. denied, 423 U.S. 876, 96 S.Ct. 149, 46 L.Ed.2d 110 (1975); Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976) ("[a] public official's threats to a citizen to withhold monies due and owing, should

legal proceedings be instituted, burdens or chills constitutional rights of access to the courts"), citing Harbolt v. Allredge, 464 F.2d 1243 10th Cir.), cert. denied, 409 U.S. 1025, 93 S.Ct. 473, 34 L.Ed.2d 319 (1972) and Evans v. Moseley, 455 F.2d 1084 (10th Cir. 1972); Dietrich Corp. v. King Resources Co., 596 F.2d 422 (10th Cir. 1979); Henriksen v. Bentley, 644 F.2d 852 (10th Cir. 1981); Shaw v. Neece, 727 F.2d 947 (10th Cir. 1984); McKay v. Hammock, 730 F.2d 1367 (10th Cir. 1984); Razotos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir.), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985); Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985); Ward v. Fort, 762 F.2d 856 (10th Cir. 1985); Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987); White v. General Motors Corp., Inc., 908 F.2d 675 (10th Cir. 1990); United States v. Dickstein, 971 F.2d 446 (10th Cir. 1992); Johnson v. Board of County Commissioners, 85 F.3d 489 (10th Cir. 1996); Dailey v. Vought Aircraft Company, 141 F.3d 224 (5th Cir. 1998). Furthermore, in Elam Construction, Inc. v. Regional Transportation District, 129 F.3d 1343, 1346 (10th Cir. 1997), the court held that the Regional Transportation District ("RTD") is a suable "person" within the meaning of 42 U.S.C. § 1983. This holding is contrary to Judge Sparr's previous orders dismissing plaintiff's federal civil rights case, imposing attorney fee sanctions of more than

$15,000.00 against the plaintiff and his attorney for filing an alleged "frivolous" appeal, indefinitely suspending plaintiff's attorney from the practice of law in the United States District Court for the District of Colorado, and disqualifying plaintiff's attorney from further representation of his client. (Record, Volume I., Documents 127, 130, 133, 155, 157, 188, 189, and 204, all pages.)[7] It therefore follows that these previous orders were null and void ab initio, and that it is no longer equitable that these orders should have prospective application. See Fed. R. Civ. P. 60(b). The same is also true for Judge Sparr's order of September 18, 1998, which merely reaffirms his previous orders. See id.

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[7]Copies of Judge Sparr's previous orders are attached hereto as Exhibits 3, 4, 5, 6, 7, 8, 9, and 10, respectively, and are incorporated herein by reference for all purposes. Also attached hereto as Exhibit 11 and incorporated herein by reference for all purposes is a copy of the disciplinary order issued on February 10, 1995 by the three-judge (including Judge Sparr) disciplinary panel of the United States District Court for the District of Colorado indefinitely suspending Mr. Smith from the practice of law in the United States District Court for the District of Colorado.

V. CONCLUSION

Mr. Smith requests an order declaring null and void ab initio, and vacating, Judge Sparr's previous orders, as well as his order of September 18, 1998, and granting such other and further relief as may be just under the circumstances.

VI. REQUEST FOR ORAL ARGUMENT

Mr. Smith hereby requests oral argument in order to address the important issues of first impression raised by this appeal.

Dated this 30th day of November, 1998.

Respectfully submitted,

DAVID L. SMITH

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(303) 534-0153

PRO SE ATTORNEY-APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of November, 1998, true and correct copies of the foregoing Opening Brief for Pro Se Attorney-Appellant David L. Smith were placed in the United States mail, postage prepaid, addressed as follows:

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